

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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~~Federal Communication Commission
Bureau / Office~~

In the Matter of)
)
East Ascension Telephone Company, LLC)
)
Petition for Waiver of the Section 54.301)
Local Switching Support Data Submission)
Reporting Date)

CC Docket No. 96-45

~~RECEIVED~~

~~JUN 10 2004~~

~~Federal Communications Commission
Office of the Secretary~~

To: Chief, Wireline Competition Bureau

PETITION FOR WAIVER -- EXPEDITED ACTION REQUESTED

East Ascension Telephone Company, LLC ("EATEL") pursuant to Section 1.3 of the Commission's Rules¹ hereby requests a waiver, to the extent necessary, of Section 54.301(b) of the Commission's rules specifically with respect to the Local Switching Support ("LSS") submission date for projected data from an incumbent local exchange carrier.² As a result of an inadvertent oversight, EATEL did not report projected accounting data pursuant to Section 54.301(b) of the rules and the Universal Service Administrative Company's ("USAC") requirements until October 2, 2003, one day after the date set forth in the rule. This data is used by USAC to project and determine the calculation of Local Switching Support ("LSS") and the amount of Universal Service dollars to be funded through contributions.

¹ 47 C.F.R. § 1.3.

² See 47 C.F.R. §54.301(b).

I. Background

USAC requires that cost study companies submit projected information that allows USAC to calculate LSS amounts for inclusion in the Universal Service Fund program for a coming year. The rules require incumbent local exchange carriers ("LECs") that have been designated an Eligible Telecommunications Carrier ("ETC") and serve 50,000 or fewer access lines within a study area to file LSS projections no later than October 1 of the year preceding the calendar year in which the LEC expects to receive LSS. For cost study companies, projected accounting data and cost information used in the calculation of LSS is submitted in order to receive LSS for periods in the next year.³

On October 2, 2003, EATEL management made an internal inquiry with EATEL regulatory and accounting personnel about the potential for a LSS filing, and an immediate internal question arose as to the status of such filing. For unknown reasons, EATEL did not receive the data collection instructions, forms, or request letters for this filing. Ms. Elizabeth Veasman at EATEL immediately accessed the USAC website to verify what data and/or other filings were due on October 1, 2003.⁴ Review of the website resulted in additional questions for the EATEL staff because the forms and instructions posted on the website were those for the October 1, 2002 data submission, and the website information had not been updated for any subsequent year. Ms. Veasman contacted the National Exchange Carriers Association ("NECA") to determine whether NECA has submitted the projected accounting data to USAC on

³ See 47 C.F.R. § 54.301(b)-(d).

⁴ EATEL did timely file with the State of Louisiana, and the State filed with the Commission and USAC on August 18, 2003, prior to October 1, 2003, its state certification for HCL, LSS, and LTS. The USAC web site page titled "General High Cost Filing Requirements" (www.universalservice.org/hc/process/filingreq.asp) under "Timetables/Deadlines" lists the annual state certification requirement as the only high cost filing requirement for October of each year and does not list a filing requirement to submit the projected accounting information that is the subject of this waiver request.

behalf of EATEL.⁵ The NECA contact indicated that because EATEL did not participate in NECA's traffic sensitive pool, NECA does not file for EATEL. The NECA contact suggested that EATEL send the filing to NECA and USAC as soon as possible and offered to assist in passing the data on to the proper USAC recipients.

The EATEL accounting and regulatory personnel dropped all other work on October 2, 2003, prepared the projected data, and sent the accounting data by electronic mail to both USAC and NECA at about 11 a.m. on that day. The data submission also included notification to USAC that EATEL had not received the data collection package and inquired whether USAC has the correct contact information for EATEL. To date, EATEL has not received any response to this inquiry. EATEL did not receive any rejection or negative response from USAC and, therefore, because the submission was late by only several hours, assumed that the submission of the data on October 2, 2003 had satisfied the necessary data submission requirements and that the process was complete.

At some point in the first week of November, Ms. Veasman reviewed the first quarter 2004 filing that USAC made with the Commission and discovered that the amount of LSS shown for EATEL was \$0.00. Ms. Veasman immediately called USAC to inquire about the apparent discrepancy. The USAC contact noted that EATEL LSS had not been included and informed Ms. Veasman that USAC was working with the Commission to have data included for any company that filed late, including EATEL for which the data was filed one day late. The USAC contact indicated that USAC expected to resolve the status of these discussions with the Commission within a couple of weeks following the conversation.

⁵ Much of the reporting of data, and subsequent dollar disbursements for the various Universal Service support components, including LSS, are typically coordinated through NECA with USAC. Consequently, NECA is involved in these processes with USAC. However, EATEL does not participate in the traffic sensitive pool administered by NECA. EATEL files its own interstate traffic sensitive access service tariff.

Approximately one month later, Ms. Veasman again contacted USAC. The same USAC staff contact indicated that some informal method to include this data was still under discussion with the Commission, and the status of those discussion had not changed since the last time they had spoken.

In January, when EATEL failed to receive LSS support payments, Ms. Veasman again contacted the same USAC staff. Ms. Veasman asked if EATEL needed to file a request for waiver of the data submission rules to address the one-day oversight. The USAC staff representative indicated that EATEL should wait because such an action should not be necessary.

In February, EATEL still did not receive LSS support payments. Ms. Veasman again attempted to contact the same USAC staff representative, but this time without success. On March 2, 2004, Ms. Veasman sent an electronic mail message to the general organization question inquiry address asking for any update on the status of the discussions with the Commission on the issue of including EATEL's one-day late data for LSS support purposes. EATEL did not receive any response, and EATEL's repeated attempts to contact the same USAC representative were unsuccessful. Finally on March 25, following another electronic mail inquiry, this time to a "local switching" organization address, EATEL received a response from a different USAC staff person suggesting that EATEL should file a waiver petition directly with the Commission. Following that response, EATEL immediately began preparing this Petition.

II. Basis for Relief.

Pursuant to Section 1.3 of the Commission's rules, the Commission may grant a waiver of the application of any of its rules for "good cause shown."⁶ As noted by the Court of Appeals for the D.C. Circuit, agency rules are generally presumed valid.⁷ However, the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁸ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁹ Waiver of the Commission's rules is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.

EATEL respectfully submits that all of the circumstances described above weigh in favor of the grant of a waiver. Strict application of the October 1, 2003 submission requirement date, particularly when the data was submitted one day later, would be contrary to the public interest. Allowing EATEL to receive LSS during 2004, now that it has filed the necessary data, will not cause any harm or burden for any other party.

The underlying purpose of the LSS universal service support program is to provide cost recovery to small LECs for the costs of their switching investment and expenses. As such, LSS

⁶ EATEL notes that for wireless carriers, Section 1.925(b)(3) of the Commission's rules provides more specific waiver criteria including a showing that: (i) The underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. See 47 C.F.R. § 1.925(b). As explained herein, the facts and circumstances for EATEL are consistent with these waiver criteria and weigh in favor of grant of the request.

⁷ See *WAIT Radio v. FCC*, 418 F.2d 1164, 1166 (D.C. Cir. 1990, cert. denied, 409 U.S. 1027 (1972)) ("WAIT Radio").

⁸ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("Northeast Cellular").

⁹ *Wait Radio* at 1159; and *Northeast Cellular* at 1166.

has been a substantial portion of EATEL's recovery of its switching costs for many years.¹⁰ The purpose of LSS is to provide support to companies with smaller switches and consequently relatively higher switching costs so that companies such as EATEL do not have to recover these relatively higher costs through intrastate, basic rates. The availability of LSS thereby avoids potentially higher basic rates that would be contrary to the established universal service principles of affordability and comparability. These purposes would be frustrated were EATEL not to receive the LSS for 2004. EATEL's overall cost recovery would be thrown into disarray. EATEL's overall ratemaking result would have to be adjusted and/or some of its plans for capital expenditures and network improvements would have to be curtailed or reevaluated were LSS disbursements not available to the company. These results are inconsistent with the principles of universal service which support the deployment of modern networks and the availability of advanced services in rural areas as those served by EATEL. Therefore, a grant of the waiver will serve the same public interest objectives as the overall Universal Service plan was designed to address. And without LSS support, those purposes will be frustrated in a manner not consistent with the public interest.

The one-day oversight in a data collection process that allows USAC approximately three months for the processing of such data is a circumstance relevant to an otherwise strict application of the reporting date rule. A one-day difference under a strict application would deny EATEL of LSS cost recovery, and would subject EATEL to burdens associated with that cost recovery denial.

Moreover, grant of the waiver request can be easily accommodated by USAC, without burden to any other carrier, within the already existing universal service process. EATEL filed

¹⁰ EATEL estimates that its monthly LSS should be approximately \$42,600. For its estimated 39,223 access lines, LSS should provide \$ 1.08 per month for each access line.

its projected accounting data well before the time period in which it is intended to be applied, and EATEL had previously been a recipient of LSS from its beginning. Consistent with the indications that EATEL received from USAC that the data submitted only one day late should not be a problem, there would be no reason for EATEL to expect that a local exchange carrier serving approximately 39,233 access lines would jump to over 50,000 access lines from one period to the next. Thus, not only did USAC have actual notice on October 2, 2003, but USAC had at least some level of notice on October 1, 2003 that the omission of what had been a constant stream of data and LSS participation was most likely a simple error.

The LSS process already utilizes a “true-up adjustment” process that corrects the results of projected data from eligible LECs with those carriers’ submission of actual LSS amounts at a later point in time.¹¹ LSS true-up adjustments take place as much as 15 months after the end of the calendar year for which actual data is submitted.¹² USAC incorporates the results of the true-up process into its recalculations of total universal service fund needs in the calculation of the universal service contribution factor. As such, EATEL’s data and LSS disbursement, upon expedited action by the Commission, can be included and “trued-up” through the already established process.¹³

¹¹ See 47 C.F.R. § 54.301(e).

¹² 47 C.F.R. § 54.301(e)(2)(iv).

¹³ If the waiver can be granted and the correction can be made on an expedited basis, the essentially negligible impact on the quarterly contribution factors can be reflected in the next USAC calculation. It is not clear to EATEL whether USAC’s projections that led to its calculation of the first quarter 2004 contribution factor may have actually included LSS expectations for EATEL, since EATEL has been a participant for LSS for a considerable amount of time, and the methods that USAC utilizes may depend on various statistical projections. In any event, the true-up process already recognizes corrections and any correction to recognize EATEL’s LSS amounts would represent a very small inconsequential percentage of the overall fund and expected true-up activity.

III. Request for Expedited Action

Unless and until the Commission grants EATEL's waiver request, it will be forced to forego the LSS cost recovery revenues. As stated above, this cost recovery support is needed and used by EATEL to support its ongoing costs and capital improvements to upgrade its network and provide advanced services. EATEL has already submitted the projected data to USAC, and it appears that USAC is fully capable of incorporating this data and proceeding to distribute LSS to EATEL as soon as USAC has notice that the Commission has granted the requested waiver relief. Moreover, expedited action will allow USAC to reflect this correction in the overall universal service plan as soon as possible.

EATEL respectfully submits that the facts with respect to the precipitating events, the policy considerations associated with the grant of the waiver request, and the implications of granting the waiver are clear and straightforward. Upon grant of the waiver, USAC can simply adjust the LSS disbursements to correct the past amounts using the ongoing true-up process. Accordingly, EATEL requests expedited action by the Commission so that USAC can be properly notified as soon as practical so that future settlements and USAC's calculations can be corrected as soon as possible. In the absence of expedited action, EATEL may be forced to pursue ratemaking changes inconsistent with universal service objectives and curtail, delay, or scale back planned network upgrades and other capital projects. This result would impose needless hardship on EATEL to pursue alternative cost recovery options and would work to penalize unnecessarily its end users that would be denied the benefits the LSS revenue would have supported.

IV. Conclusion

For the reasons stated herein, EATEL submits that good cause has been shown for the grant of the requested waiver as set forth herein. Grant of the waiver will allow EATEL to receive LSS disbursements for the year 2004 consistent with the statutory goal of preserving and advancing universal service for the rural customers served by EATEL. This result will be consistent with the public interest. Expedited action is requested to minimize the time that EATEL will be prevented from receiving the LSS cost recovery support that it expected to receive. Without the LSS support, it will be the customers of EATEL that will be burdened with potential rate changes, curtailed upgrades, or delays in the availability of advanced services. With the grant of the waiver, EATEL will merely receive the LSS that was intended under the universal service plan policies, and the grant of the waiver will not adversely affect any other carrier or customer.

Respectfully submitted,

EAST ASCENSION TELEPHONE
COMPANY, LLC

By: 

DANIEL J. AHERN, PRESIDENT

April 9, 2004

DECLARATION

I, Elizabeth Veasman, Assistant Controller, East Ascension Telephone Company, LLC ("EATEL"), do hereby declare under penalties of perjury that I have read the foregoing "Petition for Waiver -- Expedited Action Requested," and the information contained therein that pertains to EATEL is true and accurate to the best of my knowledge, information and belief.

Date: April 8, 2004

Elizabeth Veasman
ELIZABETH VEASMAN
ASSISTANT CONTROLLER